Lim Koon Chow v AmBank (M) Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D29–3881 OF 2010
LEE SWEE SENG JC
12 JANUARY 2012

Bankruptcy — Receiving and adjudication order — Rescission and annulment — Judgment creditor ('JC') agreed to set aside bankruptcy orders for debtor to take wife abroad for medical treatment — Reprieve to also enable debtor to make instalment payments — Whether debtor estopped from raising limitation when JC re-filed bankruptcy action — Whether each co-defendant liable for full amount of judgment debt if judgment does not say otherwise — Whether person denying service of process should prove alibi

The judgment creditor ('JC') had, on compassionate grounds agreed to the rescission and annulment, respectively, of the receiving and adjudication orders it had obtained against the judgment debtor ('JD') to enable him to take his wife, who was suffering from cancer, to Singapore for treatment. The JD had also promised the JC that he would make instalment payments to settle the debt. When the JC re-filed the bankruptcy proceedings eight months later, the JD raised a host of procedural and substantive objections. These included that leave should have been obtained to re-file the bankruptcy notice ('BN') more than six years after the judgment; that the claim for arrears of interest on the judgment was statute-barred, and that both the BN and the creditor's petition ('CP') were invalid. The JD filed applications to set aside the BN, CP and the substituted service of the CP. From the dismissal of those applications by the registrar, the JD appealed to the judge.

Held, dismissing the appeals with costs:

(1) The JD by his action in appealing for additional time to make instalment payments on account of his wife's treatment for cancer and his company going through a rough patch and finally persuading the JC to annul and rescind the adjudication and receiving orders obtained, was estopped from raising limitation to the JC's action (see para 76).

(2) The Limitation Act 1953 was purely procedural and in certain circumstances one could estop oneself out of the Act by conduct. Having received a reprieve from the JC, it was unjust, inequitable and unreasonable for the JD to raise the defence of limitation (see paras 76 & 78).

(3) For the JD to deny being served with the BN at the time, date and place

in question, he had to aver where he was at the said time, date and place. It would have been better if there was corroborative evidence from others vouching for his presence at a different place. It could not be the case that any person wanting to set aside service of process could just merely affirm an affidavit denying service at the time, date and place stated by the process server (see para 83).

(4) If it was intended that each of the three defendants in the judgment could only be liable for one-third of the judgment debt, then the judgment must have so expressed it. Otherwise there was no ambiguity in reading less than what it said, which was that all three defendants or each one of them was liable for the full amount of the judgment debt and that collectively they would not be made liable for more than what was the judgment sum (see para 108).

(5) It was not sufficient for the JD to show his calculation of the sum owing according to the judgment was different in that it was less than the sum stated as owing in the BN. The JD had to descend to details to show where the error had arisen (see para 61).

(6) Leave of court was not necessary to issue a BN after six years from the date of the judgment so long as the BN was issued within 12 years from that date (see para 67).

[Bahasa Malaysia summary

Pemiutang penghakiman, atas alasan belas kasihan bersetuju untuk penamatan dan pembatalan, masing-masing, bagi perintah-perintah penerimaan dan penghukuman yang telah diperolehinya terhadap penghutang penghakiman bagi membolehkan dia untuk membawa isterinya, yang mengalami kanser, ke Singapura untuk rawatan. Penghutang penghakiman juga telah berjanji kepada pemiutang penghakiman bahawa dia akan membuat bayaran ansuran untuk menyelesaikan hutang. Apabila pemiutang penghakiman memfailkan semula prosiding kebankrapan lapan bulan kemudian, penghutang penghakiman membangkitkan pelbagai bantahan prosedur dan substantif. Ini termasuklah bahawa kebenaran sepatutnya diperolehi untuk pemfailan semula notis kebankrapan ('NB') yang lebih daripada enam tahun selepas penghakiman tersebut; bahawa tuntutan untuk tunggakan faedah ke atas penghakiman tersebut dihalang oleh had masa; dan bahawa NB dan petisyen pemiutang ('PP') adalah tidak sah. Penghutang penghakiman memfailkan permohonan untuk mengenepikan NB, PP dan penyampaian ganti PP. Berdasarkan penolakan permohonan-permohonan tersebut oleh pendaftar, penghutang penghakiman merayu kepada hakim.

Diputuskan, menolak rayuan dengan kos:

(1) Penghutang penghakiman, melalui tindakannya dalam merayu untuk masa tambahan bagi membuat bayaran ansuran atas alasan rawatan

kanser isterinya dan kerana syarikat tersebut mengalami masa yang sukar dan akhirnya memujuk pemiutang penghakiman untuk menamatkan dan membatalkan penghakiman dan menerima perintah-perintah yang diperolehinya, adalah diestop daripada membangkitkan kekangan terhadap tindakan pemiutang penghakiman (lihat perenggan 76).

(2) Akta Had Masa 1953 adalah prosedur semata-mata dan dalam hal keadaan tertentu seseorang boleh mengestop dirinya berdasarkan Akta melalui kelakuannya. Setelah menerima satu penangguhan daripada pemiutang penghakiman, adalah tidak adil, tidak saksama dan tidak munasabah untuk penghutang penghakiman membangkitkan pembelaan had masa (lihat perenggan 76 & 78).

(3) Untuk penghutang penghakiman menafikan disampaikan dengan NB pada masa, tarikh dan tempat dalam persoalan, dia mestilah membuktikan di mana dia berada pada tarikh, masa, dan tempat tersebut. Adalah lebih baik jika terdapat keterangan menyokong daripada yang lain menjamin kehadirannya di tempat yang berbeza. Tidak boleh menjadi kes bahawa mana-mana orang yang mahu mengenepikan penyampaian proses boleh hanya sekadar mengikrarkan afidavit yang menafikan penyampaian pada masa, tarikh dan tempat yang dinyatakan oleh penghantar saman (lihat perenggan 83).

(4) Jika dimaksudkan bahawa setiap satu daripada ketiga-tiga defendan dalam penghakiman tersebut hanya boleh bertanggungan untuk satu pertiga daripada hutang penghakiman, maka penghakiman tersebut mestilah dinyatakan sedemikian. Jika tidak, tiada kekaburan dalam membaca kurang daripada yang dimaksudkan, iaitu bahawa ketiga-tiga defendan atau setiap satu daripada mereka bertanggungan bagi amaun penuh hutang penghakiman dan bahawa secara kolektif mereka tidak akan bertanggungan ke atas lebih daripada jumlah penghakiman (lihat perenggan 108).

(5) Tidak mencukupi bagi penghutang penghakiman menunjukkan bahawa pengiraan jumlah wang terhutangnya mengikut pertimbangan adalah berbeza kerana ia adalah kurang daripada jumlah yang dinyatakan sebagai terhutang dalam NB. Penghutang penghakiman mestilah memberikan butiran untuk menunjukkan di mana kesilapan telah timbul (lihat perenggan 61).

(6) Kebenaran mahkamah tidak diperlukan bagi mengeluarkan NB selepas enam tahun dari tarikh penghakiman selagi NB telah dikeluarkan dalam tempoh 12 tahun dari tarikh tersebut (lihat perenggan 67).]

Notes

For cases on recission and annulment, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue), paras 3373–3376.

Cases referred to

Abrahamson; Ex parte Crisp & Gunn Ltd, Re 22 ALR 749 (refd)
Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)
Alliance Bank Malaysia Bhd (formerly known Asmulti Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451; [2006] 2 CLJ 723 (refd)
Arab-Malaysian Finance Bhd v Mohd Zakaria bin Salim [2002] 3 MLJ 337; [2002] 3 CLJ 530, CA (refd)
Dato' Dr Elamaran a/l M Sabapathy, ex parte RHB Bank Bhd, Re 2010 MLJU 1424 (refd)
Ex p United Asian Bank Bhd, Re [1991] 2 MLJ 127, HC (refd)
Gan Eng San; Ex P HSBC Bank Malaysia Bhd, In Re [2011] 3 CLJ 409, HC (folld)
Hongkong & Shanghai Banking Corp v Yip Kim Khoon [1991] 3 MLJ 172; [1991] 2 CLJ 1631, HC (refd)
Kho Kak Siew, ex p MUI Bank Bhd, Re [1993] 1 MLJ 208, HC (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263, SC (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787 (refd)
Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423; [1993] 2 AMR 1889, SC (folld)
Rabindera Singh Arjan Singh, ex p Malaysian International Merchant Bankers Bhd, Re [1989] 2 CLJ 858, HC (refd)
Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304; [1988] 1 CLJ 155, SC (refd)
Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners) [1996] 5 MLJ 593; [1996] 2 BLJ 502, HC (folld)
Ti Hock Soon, ex p Perwira Habib Bank Malaysia Bhd, Re [1993] 1 CLJ 477, HC (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385, FC (refd)
Yap Kin, ex p United Malayan Banking Corp Bhd, Re [1996] 5 MLJ 355, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(d), 3(1)(i), 3(2)(ii), 3(3), 5(1)(d), 131
Bankruptcy Rules 1969 rr 18, 20, 94(1)(b), 95, 97, 109, 110, 127
Contracts Act 1950
Evidence Act 1950 s 114(g)
Interpretation Acts 1948 and 1967 ss 62, 71
Legal Profession (Practice and Etiquette) Rules 1978 r 12
Limitation Act 1953 s 6(3)

A

E Cheah (Eric Lai and Parameswari with him) (Lai & Associates) for the judgment debtor/appellant.

M Pathmanathan (Shirin Pathmanathan with him) (M Pathmanathan & Co) for the judgment creditor/respondent.

B

Lee Swee Seng JC:

PROLOGUE

C

[1] The judgment creditor ('JC') had commenced a bankruptcy proceeding against the judgment debtor ('JD') vide a bankruptcy notice ('BN') dated 5 October 2010 following a judgment obtained in the Kuala Lumpur High Court Suit No D6–22–1630 of 2002 on 16 April 2003 against the JD as the second defendant. There had been a previous receiving order ('RO') and adjudication order ('AO') obtained earlier but by consent was annulled. The JC had consented to the annulment based on compassionate ground on account of the illness of the JD's wife who was suffering from cancer and needing treatment in Singapore. The JD has also represented that he would be making his monthly repayments to the JC as they fall due. The amount stated in the BN was in the region of RM34m.

D

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PROBLEM

F

[2] Granted not many people in this country would have that kind of a money to pay a JC to avoid an act of bankruptcy. As events unfolded it appears that the second BN was filed after six years from the date of the judgment and hence the JD asserted that leave should have been obtained first. The JD also raised the objection that interest could not be claimed at all once the six years period has expired.

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[3] There were also other objections raised by the JD in his attempt to ward off the bankruptcy action with respect to, inter alia, the validity of service of the BN, the validity of the order for substituted service of the creditor's petition ('CP'), the wrong calculation of the amount outstanding in the BN, the non-compliance with the relevant forms under the Bankruptcy Rules 1969 ('BR') and non-disclosure in the CP of securities from a third party.

H

I

PRAYER

[4] In the process the JD filed various two applications to set aside the substituted service of the CP; two applications to set aside the BN and an application to set aside the CP.

[5] The registrar struck out two of the applications with costs when they were withdrawn. The registrar dismissed the remaining three applications with costs and hence these various appeals. The applications dismissed were: application to set aside substituted service of CP (encl 18), Application to set aside the BN (encl 21) and application to set aside the CP (encl 24).

PRINCIPLES

The JD's application to set aside the substituted service order of the CP (encl 40)

[6] The JC had earlier served the BN personally on the JD on 2 November 2010 at Unit D3–6–01, Solaris Dutamas, No 1 Jalan Dutamas, 50480, Kuala Lumpur. The JC attempted but failed to serve the CP on the JD personally. The JC applied for an order for substituted service of the CP and on 17 February 2011 the senior assistant registrar ('SAR') granted the said order. The substituted service was effected on 31 March 2011 and the CP was fixed for hearing on 19 April 2011.

[7] On 18 April 2011 at 2.30pm the JD served a sealed copy of the application in encl 16 to set aside the substituted order of the CP. Enclosure 16 was fixed for hearing on the same day as the CP on 19 April 2011. On 19 April 2011 the SAR gave directions for the parties to file their affidavits in respect of encl 16 and to file written submissions for hearing of the application on 7 June 2011.

[8] On 7 June 2011 when the matter came up for hearing before the deputy registrar, the JD unconditionally withdrew encl 16 and the said application was struck out with costs of RM1,000. The CP was then fixed for hearing on 14 September 2011.

[9] The JD then filed another application to set aside the substituted service of the CP in encl 18 which is an exact replica of encl 16 in that it seeks the same reliefs and are premised on similar grounds. On 9 September 2011 at 3 pm on a Friday the JD again served a sealed copy of encl 18 on the JC's solicitors' office — a mere five days before the hearing of the CP fixed on 14 September 2011.

[10] On 14 September 2011 the deputy registrar directed the parties to exhaust affidavits and written submissions and fixed decision of encl 18 on 27 September 2011 whereupon the deputy registrar dismissed encl 18 with costs and fixed the CP for hearing on 2 November 2011.

[11] The JD appealed against the said decision of the deputy registrar in

notice of appeal in encl 40. The JD served a sealed copy of encl 40 by fax on Friday of 7 October 2011 at 5.30pm stating that the same was fixed for hearing on 10 October 2011.

[12] The JD had relied on the ground that he is now residing in Singapore and that the substituted service of the CP was irregular and ought to be set aside.

The application in encl 18 is vexatious, frivolous and an abuse of the process of court

[13] Learned counsel for the JC submitted that encl 18 is vexatious, frivolous and an abuse of the court's process. Enclosure 18 served on the JC five days before the hearing of the CP on 14 September 2011 is for the same reliefs and premised on similar grounds as the previous encl 16 served a day before the hearing of the CP then fixed on 19 April 2011. In the absence of cogent reasons why the same application is filed twice and both with a similar pattern of last-minute service on the JC just before the hearing of the CP, this court would agree with the JC's submission that the second filing was done in bad faith with a view to causing the hearing date of the CP to be postponed and is thus an abuse of the court's process. At any rate there was no express condition that the JD was at liberty to file afresh application to set aside the substituted order of the CP.

[14] I agree with learned counsel for the JC in his submission that the withdrawal of encl 16 is an admisssion of defeat. The JD had contended in para 1.5 on his submission before the deputy registrar that encl 16 was withdrawn because 'there were so many issues to irregularities in dispute'. One would have expected that if that were so then the JD should have proceeded to argue how because of the irregularities the order for substituted service of the CP ought to have been set aside. It defies logic for the JD's counsel to have voluntary withdrawn the application in encl 16 and be willing to pay costs as well if indeed there were 'so many irregularities'.

[15] In *Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners)* [1996] 5 MLJ 593 at p 599; [1996] 2 BLJ 502 at p 507, His Lordship Low Hop Bing J (as he then was) dealing with the principle of payment of costs in a case where a plaintiff withdraws an action, quoted with approval a passage from *Barrets & Baird (Wholesale) Ltd v IPCS (NLJ)* 16 December 1988, 357, where Henry J observed as follows at p 358:

> Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance, the discontinuance is effectively a defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now

> become academic save for the question of costs. In those circumstances where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgement of likely defeat.

[16] What is clear here is that the issues are very much alive and certainly far from being academic. In the absence of a plausible explanation as to why there was a withdrawal of the application only to be followed by another application filed and served just like the first application, a few days before the hearing of the CP — one must be forgiven for concluding that the only probable reason for so doing was to buy time for the JD in causing the hearing date of the CP to be postponed. On that ground alone the application in encl 18 ought to have been struck out *in limine* for being an abuse of the process of the court. Were it not so, any party to a proceeding would be filing and withdrawing and filing again only to skirt and scuttle whatever dates the court might have fixed for the hearing proper. Most courts would of course nip the problem in the bud by stating that any further withdrawal is with no liberty to file afresh.

The application in encl 18 is in breach of the Bankruptcy Rules 1969

[17] Rule 20 of the Bankruptcy Rules clearly provides that:

> Except where these Rules or the Act otherwise provide, an application and the affidavit in support shall be served on every party affected thereby not less than eight clear days before the day appointed for the hearing.

[18] The JD only served the sealed copy of the application in encl 18 on the JC's solicitors at 3pm on 9 September 2011, hardly five days before the hearing of the CP fixed on 14 September 2011. I agree with learned counsel for the JC that the JD had some three months from the previous date of 7 June 2011 when a similar application in encl 16 was withdrawn, to file this application in encl 18. Instead he chose to file it only on 26 August 2011 knowing very well that there were the intervening Raya and Merdeka Day holidays. The JD had also failed and/or neglected to serve an unsealed copy of encl 18 on the JC's solicitors.

[19] On that ground alone the application in encl 18 ought to have been dismissed for non-compliance with r 20 of the Bankruptcy Rules 1969.

[20] Assuming for a moment that I had been wrong to have dismissed this appeal on that ground, I have nevertheless proceeded to consider if the JD's application has any merits at all.

Whether the order for substituted service of the CP was irregular and ought to be set aside

[21] Learned counsel for the JC submitted that the JC had acted bona fide and complied with all the relevant provisions of the Bankruptcy Act 1967 ('BA') and the Bankruptcy Rules 1969 ('BR') as well as Practice Note No 1 of 1968.

[22] Rule 109of the BR clearly provides that:

> A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

[23] Pursuant to r 109 of the BR the JC averred that the process server had made several attempts to personally serve the CP on the JD but was unsuccessful as the JD was evading service. The affidavit of non-service of the process server one Jamil bin Chik was affirmed on 8 February 2011 and filed in support of the application for substitituted service of the CP.

[24] The JC had earlier fixed an appointment to serve the CP on the JD at 3pm on 26 January 2011 vide the JC's solicitor's letter dated 12 January 2011. The letter of appointment dated 12 January 2011 was addressed to the JD and delivered to the JD via AR Registered Post by Pos Malaysia. The letter of appointment addressed to the JD was accepted and the delivery card returned to the JC.

[25] The said letter informed the JD that if he failed to keep the appointment or set up a new appointment then the JC would apply for substituted service of the CP. The JD failed and/or neglected to keep the said appointment on 26 January 2011 and instead had on 26 January 2011 filed encl 14, ie the JD's application to set aside the BN.

[26] It was thus perfectly proper for the JC to have applied for substituted service of the CP pursuant to r 110 of the BR which reads:

> 110 Substituted service.
>
> (1) If the Court is satisfied by affidavit or other evidence on oath that prompt personal service cannot be affected because the debtor is keeping out of the way to avoid service of the petition or any other legal process or for any other cause it may order substituted service to be effected in such manner as it thinks fit.

[27] The SAR was satisfied that the JD was keeping out of the way and avoiding service of the CP and hence ordered that service of the CP be effected by substituted service.

[28] In the premises, the JC effected substituted service of the CP in accordance with the said order dated 17 February 2011 on 31 March 2011.

[29] The JD submitted that the JC is fully aware that the JD is residing at No 35 Maryland Drive, Singapore. I agree with the JC's submission that there is no legal impediment or prohibition in the BA and/or the BR against the filing of a CP against a JD domiciled in Singapore and there is no requirement in the BR and/or BA which provides that the CP must be served on the JD at his last known address or at the JD's place of residence.

[30] Under ss 3(3) and 5(1)(d) of the BA, it suffices if the JD has a dwelling house, carries on business or has place of business in Malaysia.

[31] Section 3(3) of the BA reads:

> The word 'debtor' in this Act shall be deemed to include any person who at the time when the act of bankruptcy was done or suffered by him —
>
> (a) was personally present in Malaysia, or
>
> (b) ordinarily resided or had a place of residence in Malaysia, or
>
> (c) was carrying on business in Malaysia either personally or by means of an agent, or
>
> (d) was a member of a firm or partnership which carried on business in Malaysia.

[32] Section 5(1)(d) of the BA further provides as follows:

> A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —
>
> (d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or *had a dwelling house or place of business in Malaysia or has carried on business in Malaysia* personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager. (Emphasis added.)

[33] I agree with the JC that there is more than ample evidence that the JD is a Malaysian citizen carrying on business in Malaysia. A Companies Commission of Malaysia ('CCM') search on Compusoft Sdn Bhd ('Compusoft') dated 23 March 2011 reveals that the JD is still listed as Director

of Compusoft, a Malaysian-based company operating from Malaysia, and with a home address in Malaysia. The address stated in the CP is the business address of Compusoft. Sometime in October 2010 when the JC's process server went to serve the BN personally on the JD at Ground Floor, Wisma Mirama, Jalan Wisma Putra, 50460 Kuala Lumpur (the address stated in the CCM search which was also the address of Systems (M) Bhd ('MCSB'), once a public-listed company with the JD as the helm of its leadership and in which company Compusoft has substantial and major shareholding), there was a notice posted on the said premises stating that Compusoft had moved to a new premises at 'Unit D3–6–01, Solaris Dutamas, No. 1 Jalan Dutamas, 50480 Kuala Lumpur'.

[34] This is the very same address at which the BN was personally served on the JD on 2 November 2010 and to which the letter of appointment to serve the CP had been sent and acknowledged.

[35] Compusoft is part of the companies in the stable of MCSB. From the annual report of MCSB it was disclosed that Compusoft holds about 22% shares in MCSB. This qualifies it to be in the group of companies of MCSB. Indeed in the webpage of MCSB accessed on 3 November 2011 at http://www.mcsb.com had this notice:

> Notice: MCSB Office Relocation
>
> After many long years of working from our office in Wisma Mirama, we have made the decision to move our headquarters to a new and modern office location in Solaris Dutamas. Please be informed that our new address and contact numbers are:
>
> Unit D3–6–01, Solaris Dutamas
>
> No.1 Jalan Dutamas
>
> 50480 Kuala Lumpur
>
> Help desk: (03) 6209–3400
>
> Gen.Line: (03) 6209–3456
>
> Fax: (03) 6205–3181
>
> We expect to be fully operational in our new Solaris Dutamas office by 11 October 2010. Please send all communication to this address ….

[36] There was also a message from the JD occupying the triune position as President, Chairman and CEO of MCSB. The JD is very much in business in Malaysia at the new address in Solaris Dutamas. Anyone with some business sense would know that any moving to a new premises would involve renovation, relocation and refurbishment costs. The JD's contention that the company Compusoft is a dormant company is not borne out by the search

result under 'Status' and even if it is, certainly the company MBSB is not, with its website publicising its services of website design and other IT related services as well as painting the picture of a vibrant company in an expansion mode not just nationally but regionally with vacant positions to be filled.

[37] Further the guarantee and indemnity dated 30 August 1996 executed by the JD in favour of the JC under which judgment had been obtained against the JD had provided for the following in cl 3.1.1 as follows:

> This Guarantee and Indemnity shall be governed by and construed in all respects in accordance with the laws of Malaysia and the parties hereto hereby submit to the jurisdiction of the courts in Malaya in all matters arising out of or in connection with this Guarantee and Indemnity.

[38] Therefore I agree with learned counsel for the JC that the JC has every right to proceed with these proceedings in Malaysia and to serve the documents on the JD in Malaysia. I find it difficult to comprehend how the JD can be in Malaysia to affirm the various affidavits and yet when it comes to keeping an appointment or proposing an alternative appointment to be duly served with the CP, the JD could not keep such an appointment.

[39] The different dates on which the JD had affirmed in Petaling Jaya the various affidavits in this proceeding are set out below:

AFFIDAVITS AFFIRMED BEFORE THE COMM1SS10NOR OF OTHS AT NO. 69A. JALAN SS 21/37. DAMANSARA UTAMA. 47400 PETALING JAYA. SELANGOR DARUL EHSAN

Enclosures	Date of Affirming Affidavits	Regarding
13	26 Jan 2011	Affidavit In Support (Application to Set Aside Bankruptcy Notice)
15	22 March 2011	Affidavit In Support (To Support Judgment Debtor's Application to Set Aside Order Dated 17.2.2011 regarding Judgment Creditor Substitute Service)
17	16 May 2011	Judgment Debtor's Affidavit In Reply (In respect of the Judgment Debtor's application to set aside the Order dated 17.2.2011 in respect of the substituted service of Creditor's Petition)
20	26 Aug 2011	Affidavit In Support (In relation to the application to set aside the Bankruptcy Notice dated 5.10.2010)

23	6 Sept 2011	Affidavit In Support (In relation to the application to set aside the Creditor's Petition)
26	6 Sept 2011	Affidavit In Support (Application to Stay the hearing the Creditor's Petition)
29	12 Sept 2011	Judgment Debtor's Supplementary Affidavit (In relation to the application to set aside the Bankruptcy Notice)
30	12 Sept 2011	Judgment Debtor's Supplementary Affidavit (In relation to the application to set aside the Substituted Service Order)
39	26 Sept 2011	Judgment Debtor's Affidavit In Reply (2) BN (In relation to the application to set aside the Bankruptcy Notice dated 5.10.2010)
47	20 Sept 2011	Judgment Debtor's Affidavit In Reply (1) BN (In relation to the application to set aside the Creditor's Petition dated 17.12.2010)
48	20 Sept 2011	Judgment Debtor's Affidavit In Reply (1) (In relation to the application to set aside the Substituted Service Order 17.2.2011)
49	20 Sept 2011	Judgment Debtor's Affidavit in Reply (1) BN (In relation to the application to set aside the Bankruptcy Notice dated 5.10.2010)
52	25 Oct 2011	Affidavit in opposition (In relation to the Notice by Debtor of Intention to Oppose Petition)

[40] At any rate the substituted service of the CP was effective in bringing the CP to the notice of the JD as can be seen in the JD taking action and instructing his solicitors to apply to set aside the order for substituted service of the CP as well as the application to set aside the CP in encl 24.

[41] In the light of the reasons given I have no difficulty in dismissing the JD's appeal with costs of RM10,000 in encl 40 from the decision of the deputy registrar in encl 18 in dismissing the JD's application to set aside the order for substituted service of the CP.

The JD's application to set aside the BN (encl 42)

[42] The BN was served personally on the JD on 2 November 2010 at Unit D3–6–01, Solaris Dutamas, No 1 Jalan Dutamas, 50480 Kuala Lumpur.

[43] This is the JD's appeal (encl 42) against the decision of the learned deputy registrar dated 27 September 2011 dismissing the JD's application vide summons in chambers dated 26 August 2011 ('encl 21') to set aside the BN dated 5 October 2010 with costs.

The application by the JD to set aside the BN is frivolous, vexatious and an abuse of the process of the court

[44] The JC submitted that the JD's application is baseless, vexatious, and a blatant abuse of the process of court. The JD had earlier applied to set aside the BN dated 5 October 2010 vide summons in chambers dated 26 January 2011 ('encl 14'). The CP had earlier been fixed for hearing on 19 April 2011. On 18 April 2011 the JD served a sealed copy of encl 14 on the JC's solicitors at 2.30pm for hearing on the next day 19 April 2011. The present application (encl 21) replicates encl 14 in that it seeks the very same reliefs and are premised on the very same grounds. On 7 June 2011 encl 14 was withdrawn unconditionally and was therefore struck out with costs of RM1,000. The JD requested for a long hearing date for the hearing of the CP to enable the JD to settle the matter amicably. However the JD had not made any attempt to try to settle the matter.

[45] The JD refiled the same application (encl 21) and served it on the JC's solicitor's office at 3.30pm on 9 September 2011 stating that the same was fixed for hearing on 14 September 2011, hardly five days from the date of hearing of the CP on 14 September 2011. The CP of course could not be heard on that day and the deputy registrar fixed 27 September 2011 for decision on encl 21 after giving directions on the filing of affidavits and submissions. On 27 September 2011 the deputy registrar dismissed encl 21 with costs and fixed the new hearing date of the CP on 2 November 2011.

[46] Learned counsel for the JC submitted that the filing of encl 21 is a clear and blatant abuse of the process of this honourable court. Enclosure 21 is an exact replica of encl 14.

[47] The said application prayed for exactly the same reliefs and was premised on the very same grounds stated in encl 14. The earlier application (encl 14) had been struck out with costs of RM1,000 which the JD has yet to pay to the JC. The order did not say that it was struck out with liberty to file afresh. It follows therefore that the JD does not have liberty to file afresh. The only reason for withdrawing encl 14 was that 'there were so many issues to irregularities in dispute'. As I said before in the withdrawal of a previous application to set aside the service of the CP (encl 16) only to have it refiled again (encl 18), if really there were so many issues, one would have thought that the JD would proceed to argue rather than having it withdrawn and being

A mulcted with costs of RM1,000. Such a modus operandi happening not once but twice in such a short span of time can only reinforce one's suspicion that the only reason for doing this is to cause the hearing date of the CP to be adjourned and in the process to buy time for the JD.

B **[48]** I am quite certain that if the JD's counsel had wanted the liberty to refile the same application again, that would have been strenuously objected to by the JC's counsel. The fact that there was no condition attached to the withdrawal would mean that there is no liberty to refile afresh and if the JD had wanted to preserve this liberty, it should be expressly provided for so that the JC C can decide whether to object to the withdrawal or not on such a term.

[49] The second filing of the same application in encl 21 is an abuse of the process of the court in the absence of cogent and convincing reasons. The second filing and service at the eleventh hour is calculated to cause a further D delay in the hearing of the CP. It behoves counsel appearing in court to remember r 12 of the Legal Profession (Practice and Etiquette) Rules 1978:

> 12 Advocate and solicitor not to conduct civil case intended to delay proceedings etc.
>
> E An advocate and solicitor shall not conduct a civil case or make a defence which is intended merely to delay proceedings or to harass or injure the opposite party or to work oppression or wrong.

F **[50]** In the context of a bankruptcy action, r 127 of the BR is especially relevant:

> 127 Adjournments of hearing.
>
> After the expiration of one month from the day appointed for the first hearing of a G petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed unless the debtor has given prior notice that he intends to show cause against the petition; but in every such case unless an order for adjournment is made the Court shall either make a receiving order or dismiss the petition.

H **[51]** My observation in *Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners)* [1996] 5 MLJ 593; [1996] 2 BLJ 502 would also equally apply to this case.

I **[52]** The second filing of the application to set aside the BN in encl 21 in the absence of a clear, cogent and convincing reason which have not been forthcoming, ought to be struck out in limine for being an abuse of the process of the court.

Whether the JD's application to set aside the BN was made under r 18 or r 95 of the Bankruptcy Rules 1969

[53] JC's counsel submitted that encl 21 to set aside the BN is defective and does not comply with the BR and should be dismissed.

[54] Rule 95 of the BR is the specific rule governing the setting aside of a BN. However the filing of such an affidavit appears to be for cases referred to in r 94(1)(b) where the JD has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt and which he could not have set up in the action in which the judgment or order was obtained. This is because an act of bankruptcy is committed seven days after the service of the BN. Only when an affidavit under r 95 is filed within seven days is the JD expressly saved:

> … no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

[55] Enclosure 14 was filed on 26 January 2011, more than two months after the BN was personally served on the JD and encl 21 was filed on 26 August 2011, more than nine months after the BN was personally served on the JD. An act of bankruptcy was committed by the JD on 10 November 2010. Clearly the JD here is not coming under r 95 of the BR but under r 18 of the BR which provides:

> (1) Except where these Rules of the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

[56] Under a r 18 application to set aside the BN served, such an application does not by itself operate to extend the time for the JD to comply with the BN. The CP that was filed pursuant to an Act of Bankruptcy committed by the JD was not filed prematurely but properly.

[57] His Lordship Mah Weng Kwai, JC (as he then was) in *In Re Gan Eng San; Ex P HSBC Bank Malaysia Bhd* [2011] 3 CLJ 409 at p 416 made the pertinent observation on a r 18 of the BR application and I am in full agreement with His Lordship:

> (g) Generally, without an order for a stay of proceedings or an extension of time to comply with a statutory notice, the filing of a summons in chambers would not operate to stop time from running. In this case, even if the JD had filed the summons in chambers before the expiry of the seven day period but without an order for a stay of proceedings or an extension of time to comply with the BN, I am

A of the view that the mere fact that the JD had filed the summons in chambers would not operate to extend time for the JD to comply with the BN. This is simply because there is no equivalent provision in the BR that with the filing of a summons in chambers, no act of bankruptcy is deemed to have been committed until the disposal of the summons in chambers, unlike that provided for in an B affidavit-application under r 95(1).

[58] The JD's grounds to set aside the BN are that:

(a) the JC has claimed for wrongful interest in the BN;

C

(b) service of the BN is irregular and not according to law;

(c) this is the second time the JC has commenced bankruptcy proceedings against the JD; and

D

(d) the JC did not obtain leave of court to commence bankruptcy proceedings.

Whether the sum claimed in the BN is accurate

E **[59]** The BN is computed strictly in accordance with the judgment dated 16 April 2003 (see Appendix D of the JC's submission):

> jumlah sebanyak RM21,615,617.23 yang tertunggak, kena dibayar dan dihutang setakat 31 haribulan Disember 2002 bersama-sama dengan faedah di atasnya pada F 9.9% setahun atas kiraan bulanan dari 1 haribulan Januari 2003 hingga penyelesaian.

[60] The said judgment specifically provided that interest be calculated at 9.9%pa on monthly rests from 1 January 2003. A detailed breakdown of the G particulars of computation of the amount due and owing can be seen in the BN (see Appendix F of the JC's submission) and is reproduced below:

NOTIS KEBANKRAPAN

H BUTIR-BUTIRNYA

Amaun Penghakiman setakat 31.12.2002	RM 21,615,617.23
Tambah: Faedah atas RM21,615,617.23 pada kadar 9.9% setahun atas kiraan I bulanan dari 01.01.2003 hingga 31.08.2003	RM 1,466,434.97
Tolak: Bayaran pada 28.08.2003	(RM 220,432.62)
Baki h/b	RM 22,861,619.58
Baki b/b	RM 22,861,619.58

Tambah: Faedah atas RM22.861,619.58 pada kadar 9.9% setahun atas kiraan bulanan dari 01.09.2003 hingga 30.09.2003	RM 186,024.69
Tolak: Bayaran pada 02.09.2003	(RM 181,240.30)
Tambah: Faedah atas RM22,866,403.97 pada kadar 9.9% setahun atas kiraan bulanan dari 01.10.2003 hingga 30.09.2004	RM 2,376,155.68
Tolak: Bayaran pada 13.09.2004	(RM 50,000.00)
	RM25,192,559.65
Tambah: Faedah atas RM 25,192,559.65 pada kadar 9.9% setahun atas kiraan bulanan dari 01.10.2004 hingga 31.08.2006	RM 5,230,998.18
Tolak: Bayaran pada 01.08.2006	(RM 1,500,000.00)
	RM 28,923,557.83
Tambah: Faedah atas RM28.923.557.83 pada kadar 9.9% setahun atas kiraan bulanan dari 01.09.2006 hingga 30.04.2006	RM 1,953,908.93
Tolak: Bayaran pada 02.04.2007	(RM 50,000.00)
	RM 30,827,466.76
Tambah Faedah atas RM30,827,466.76 pada kadar 9.9% setahun atas kiraan bulanan dari 01.05.2007 hingga 31.10.2007	RM 1,570,849.61
Tolak:Bayaran pada 17.10.2007	(RM 418,500.00)
Bayaran pada 22.10.2007	(RM 100,000.00)
Baki h/b	RM 31,879,816.37
Baki b/b	RM 31,879,816.37
Tambah Bayaran pada 17.10.2007 Bayaran pada 22.10.2007 Faedah atas RM31,879,816.37 pada kadar 9.9% setahun atas kiraan bulanan dari 01.11.2007 hingga 30.11.2007	RM 259,405.63
Tolak: Bayaran pada 06.11.2007	(RM 332,000.00)
	RM 31,807,222.00
Tambah: Faedah atas RM31,807,222.00 pada kadar 9.9% setahun atas kiraan bulanan dari 01.12.2007 hingga 31.01.2008	RM 537,132.89
Tolak: Bayaran pada 11.01.2008	(RM 80,000.00)
Bayaran pada 28.01.2008	(RM 86,400.00)
	RM 32,177,954.89

Tambah: Faedah atas RM32,177,954.89 pada kadar 9.9% setahun atas kiraan bulanan dari 01.02.2008 hingga 31.05.2008	RM 1,069,119.02
Tolak: Bayaran pada 28.05.2008	(RM 83,000.00)
	RM 33,164,073.91
Tambah: Faedah atas RM33,164,073.91 pada kadar 9.9% setahun atas kiraan bulanan dari 01.06.2008 hingga 31.07.2008	RM 550,975.42
Tolak: Bayaran pada 21.07.2008	(RM 83,379.51)
	RM 33,631,669.82
Tambah Faedah atas RM33.631,669.82 pada kadar 9.9% setahun atas kiraan bulanan dari 01.08.2008 hingga 30.09.2008	RM 558,743.89
Tolak: Bayaran pada 05.09.2008	(RM 25,000.00)
Baki h/b	RM 34,165,413.71
Baki b/b	RM 34,165,413.71
Tambah: Faedah atas RM34,165,413.71 pada kadar 9.9% setahun atas kiraan bulanan dari 01.10.2008 hingga 31.12.2008	RM 859,654.20
	RM 35,025,067.91
Tolak: Bayaran pada 06.10.2009	(RM 500,000.00)
Bayaran pada 15.01.2010	(RM 125,000.00)
Bayaran pada 26.01.2010	(RM 100,000.00)
Bayaran pada 20.04.2010	(RM 150,000.00)
Jumlah setakat pada 30.09.2010	RM 34,150,067.91

[61] It is not sufficient for the JD to show that his calculation of the sum owing according to the judgment obtained is different in that it is less than the sum said to be owing by the JC. The JD must descend to details to show where the error has arisen. Effect must be given to s 3(2)(ii) of the BA which proviso expressly stated that:

> Provided that a bankruptcy notice —
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; …

[62] As was stated by the Supreme Court in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ 155:

Under proviso (ii), a notice demanding a greater amount would not be liable to be held bad and incapable of amendment.

Williams and Muir Hunter on *The Law and Practice of Bankruptcy* (19th Ed) at p 492 under the heading 'Formal Defect Not To Invalidate Proceedings', refers to s 147(i) of the English Bankruptcy Act 1914 which is word for word the same as our s 131:'147(1) No proceeding in bankruptcy shall be invalidated by any formal defect or by irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.'

Where a bankruptcy notice has been served, and not complied with, in respect of a judgment debt which has subsequently been reduced on appeal, that reduction does not retrospectively per se cause the notice to become defective or irregular, so as to require the protection of this section.

The respondent gave notice of intention to oppose the petition but made no mention of any irregularity. It is fair to say that if one wants to challenge the validity of a bankruptcy notice, one must give proper notice. We are unable, as the respondent urged us, to say that the bankruptcy notice is irregular and invalid and that the respondent has not committed an act of bankruptcy within the meaning of s 3(1)(c) of the Bankruptcy Act 1967 entitling the petitioning creditors to petition herein.

[63] Furthermore such a challenge must be made within the seven days allowed for the JD to make payments and as the challenge was not so made, this application at a late stage after the issuance of the CP to now challenge the sum that is required to be paid to avoid an act of bankruptcy is made too late in the day. At any rate the JD had not said that at all material time he was perpared to pay the lesser figure based on his correct calculation but that the JC had unreasonably refused to accept.

Whether leave of court is necessary to institute a bankruptcy proceeding after six years

[64] It is the JD's contention that leave of court is necessary to issue a BN after six years from the date of the judgment. Such a proposition is wholly misconceived and unfounded as it failed to consider the law as clarified and confirmed by the Federal Court's decision in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 where the headnotes summarised the position as follows:

Held

(1) A bankruptcy proceeding is not a writ of execution' within the meaning of O 46 r 2 of the RHC.

(2) A bankruptcy proceeding, by definition of the word 'action in s 2 of the Limitation Act 1953 (LA), is an action and it is caught by the provisions of s 6(3) of the LA.

A (3) Therefore, a bankruptcy proceeding is an 'action upon a judgment' within the meaning of s 6(3) of the LA. The limitation for bringing the action is 12 years but arrears of interest may only be claimed for six years.

(4) Section 6(3) of the LA should be read conjunctively; s 6(3) allows an action upon judgment to be brought within 12 years but in such an action arrears of interest B may only be claimed for a period of six years.

(5) Section 6(3) of the LA applies to bankruptcy proceedings; and while a bankruptcy proceeding may be brought within 12 years of the date of the judgment, arrears of interest may only be claimed for a period of six years from the date of judgment.

C

[65] Section 6(3) of the Limitation Act 1953 provides:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of D interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[66] His Lordship Abdul Hamid Mohamad FCJ (as the former CJ then was) E further held at p 797c:

> So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980.

F

[67] I therefore hold that no leave of the court is necesary to issue a BN after six years from the date of the judgment for so long as the BN was issued within 12 years from the date of the judgment as in this present case.

G Whether a claim for interest calculated up to six years from the date the date on which the interest became due can be made after the six years period

[68] According to the judgment dated 16 April 2003 interest on the H judgment sum was to be calculated from 1 January 2003. From the detailed computation in Appendix F, it is clear that the JC had only claimed interest up to six years from 1 January 2003, ie 31 December 2008 and has taken into account all payments made towards settlement of the judgment sum.

I **[69]** In the premises, the quantum stated in the BN is accurate and computed strictly in accordance with the judgment dated 16 April 2003.

[70] The JD contended that the BN is invalid because even though the amount of arrears of interests claimed is for six years from the judgment date or

from the date the interest became due, the BN was filed after six years. The judgment was obtained on 16 April 2003. The limitation period to claim the interests is 16 April 2009. However the BN was filed on 5 October 2010.

[71] Learned counsel for the JD submitted that the facts in the Federal Court case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385 is on all fours with the facts in the present case. In that case, His Lordship Abdul Malek Ahmad FCJ at p 397 said:

> On these considerations, we would hold that it is obvious that the second limb of s 6(3) of the Act (ie The Limitation Act) provides that an action to recover arrears of interest must be brought within six years of the judgment date …
>
> Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, arrears of interest included.
>
> In the instant case, although the amount of arrears of interest claimed is only six years from the judgment date, the bankruptcy notice had been filed on 24 January 1996, long after the limitation period of six years which expired on 14 October 1993.

[72] At p 398:

> To answer the question posed, we would recapitulate by saying that in view of the wording of the second limb of s 6(3) of the Act, the act of recovery of the arrears of interest in respect of the judgment debt must be made within six years of the judgment date and only up to the date of the act of recovery. In our view, there is no formal defect or any irregularity in the instant case and s 131 of the Bankruptcy Act is certainly not applicable. The only error of the appellant here was to file the bankruptcy notice out of time.

[73] In that case, the BN was held to be invalid and set aside. Learned counsel for the JD submitted that the BN filed by the JC is also invalid and it must therefore be set aside.

[74] His Lordship Abdul Hamid Mohamad FCJ (as the former CJ was then) in *Lim Ah Hee*'s case was conscious of the fact that his conclusion may be inconsistent with that of Abdul Malek Ahmad FCJ in *Ernest Cheong*'s case and His Lordship respectfully remarked as follows at p 803:

> With greatest respect, as I have held that the whole of s 6(3) should be read conjunctively, s 6(3) allows an action upon judgment to be brought within twelve years but in such an action arrears of interest may only be claimed for a period of six years.

[75] I would with the greatest of respect follow the latter decision of the Federal Court in *Lim Ah Hee*'s case as I find the interpretation of s 6(3) of the Limitation Act by the former CJ Abdul Hamid Mohamad to be both sensible and sound and the specific parts of His Lordship analysis and arguments are set out below at pp 800–802:

> Coming back to the issue now before this court. In my view, the answer lies in the answers to the following questions:
>
> (a) Whether a bankruptcy proceeding is an 'action' within the meaning of s 6(3) of the Limitation Act 1953 as defined in s 2 of the same Act; and
>
> (b) whether the 'two limbs' of s 6(3) should be read disjunctively or conjunctively.
>
> We have seen from the decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC 1980. But, that does not necessarily mean that it is therefore 'an action' within the meaning of s 6(3). We still have to consider the meaning of 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953 that includes 'a suit or any other proceeding'.
>
> Of course, by merely looking at the word 'action' in s 6(3) it appears that the word 'action' does not include a bankruptcy proceeding. It is also clearly not a 'suit', one of the words used in the definition of the word 'action' in s 2. But, is it not a 'proceeding in a court of law' 'upon any judgment' (I am reading the provisions in ss 2 and 6(3) together).
>
> I do not think that it can be argued that a bankruptcy proceeding is not proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of 'action' is s 2, it is an 'action' and an action upon a judgment.
>
> A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding. Section 6(3) itself is about 'action upon a judgment'. Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then the existence of a judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by law, whether it is to be considered as a cause of action or not, if relevant. Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding up or election, to

name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.

On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word 'action' in s 2 of the Act is an 'action' and it is caught by the provisions of s 6(3).

The next question then is whether the so-called first and second limbs of s 6(3) should be read conjunctively or disjunctively …

… Furthermore, we should look at the scheme of our Limitation Act 1953. Where, as has been pointed out, the limitation of action is six years, the provision is silent on the limitation period for claiming arrears of interest. The reason is clear: it is not necessary because it is automatically limited to six years. Where the limitation of action is twelve years as in s 21 (and s 6(3)), the limitation period for claiming arrears of interest is six years (see *Ernest Cheong* for meaning of 'arrears of interest'). So, the limitation period for claiming arrears of interest is consistent ie, six years in all cases. The exception is execution proceedings. But, first of all, it is 'execution' not an 'action'. Secondly, if execution is to be done after six years leave of court must be obtained. That, perhaps, is the reason for the requirement of leave, leave may not be granted at all or it may be granted with condition attached, eg the arrears of interest may be limited to six years also. On these grounds I am of the view that the whole subsection should be read together and not to be split to first and second limb and to read them disjunctively.

In conclusion, it is my considered opinion that a bankruptcy proceeding is an 'action upon (a) judgment' within the meaning of s 6(3). The limitation for bringing the action is twelve years but the arrears of interest may only be claimed for six years.

[76] Even if I were wrong in following *Lim Ah Hee*'s case in favour of *Ernest Cheong*'s case, I would hold that the JD by his action in appealing for additional time to make the instalment payments on account of his wife's treatment for colon cancer and his company Compusoft going through a rough patch and finally in persuading the JC to annul the AO and RO obtained, is now estopped from raising limitation to the JC's action. As was highlighted by His Lordship Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202, a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings. His Lordship observed at pp 244–245:

Only six years ago, in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 Lord Denning emphasised the return to estoppel as a sword when he synthesised the cases and announced that the doctrine of estoppel had become 'overloaded' with cases and that 'the separate developments' of estoppel by representation, promissory and proprietary estoppel could now be seen 'to merge into one general principle shorn of limitations'. That general principle was that where a man by his words or conduct, has led another to believe

in a particular state of affairs, he will not be allowed to go back on it when it would be 'unjust or inequitable' for him to do so. Lord Denning's actual words will repay reading and they are as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become over-loaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

In *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49, a decision of the Privy Council from the then Federal Court of Malaysia, in a case of moneylenders, Their Lordships said:

> … there are statutes which, though declaring transactions to be unenforceable or void, are nevertheless not absolutely prohibitory and so do not preclude estoppels. One example of this is the statute of frauds (see *Humphries v Humphries* [1910] 2 KB 531 (CA) in which it was no doubt considered that … the statute ought to be treated as regulating procedure, not as striking at essential validity) … a more direct test to apply … is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.

These words are widely drawn and suggest that the Limitation Act can give way to estoppel. Indeed, there are dicta in *Turberville v West Ham Corporation* [1950] 2 KB 208 which suggest that a defendant will not be heard to rely on a statute of limitation if his acts or statements during the currency of the period have induced the plaintiff to delay proceedings.

And, in *Othman & Anor v Mek* [1972] 2 MLJ 158, Ong CJ said:

> … Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury's Laws of England* (3rd Ed) at p 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see *Holmes v Cowcher* [1970] 1 WLR 835 where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. If, as in that case,

equitable rights did not perish by reason of limitation, can this same defence be set up here to deny the rights of a beneficial owner to be granted his claim to the legal title?

So far as may be necessary, I would hold that based on these dicta the Limitation Act is purely procedural: see *Othman and Anor v Mek* [1972] 2 MLJ 158 and of *Michell v Harris Engineering Co Ltd* [1967] 2 QB 703 (CA). And, therefore, in certain circumstances, one can estop oneself out of the Limitation Act by conduct.

[77] What are the circumstances that would estop the JD from raising limitation against the JC? Even though an RO and AO had been obtained against the JD in the Shah Alam High Court on 3 December 2009, the JC had consented to the RO and AO being annulled on the representation by the JD that his wife was seeking medical treatment in Singapore and that he would be making his instalment payments. The said RO and AO was annulled on 9 February 2010. The JD's bankruptcy would present an obstacle to his travel to Singapore without proper security being furnished. The JC was thus not unsympathetic and consented to the annulment. In a letter dated 15 July 2010 from the JD to the JC which letter is not being denied by the JD's counsel, the JD wrote:

Re: Request for deferment of loan repayment

Recently, an unforseen crisis has occurred in my family, which will impact on my financial resources and hence my repayment of the loan on behalf of Compusoft.

On 3 June 2010, my wife was diagnosed with colon cancer which has spread to the lungs. She went through a major operation on 14 June 2010 to have the tumor removed and has started on chemotherapy on 13 July 2010.

The oncologist will be using the latest cancer drugs which have been found to be effective in treating cancer of the colon that has spread to the lungs. However, the drug are very expensive and are estimated to cost RM20,000 per dose. In view of her rather advanced stage, she may need to undergo more than six cycles of chemotherapy. The first block of six cycles will take at least 3 months.

My priority is get her treated as soon as possible in spite of the exorbitant cost.

[78] The JC did withhold filing a fresh BN and only refiled again on 5 October 2010. Having received a reprieve from the JC, the JD cannot now be heard to say that the JC's action in bankruptcy is now barred by limitation. It would be unjust, inequitable and unreasonable for the JD to now raise the defence of limitation. Indeed the JD would be estopped from so raising.

Whether the BN has been properly served on the JD

[79] The affidavit of service of Jamil bin Chik stated that the BN was

personally served on the JD at Compusoft's business address at Unit D3–6–01, Solaris Dutamas, No 1 Jalan Dutamas, 50480 Kuala Lumpur on 2 November 2010, in accordance with r 97 of the BR. The JD had confirmed and admitted that he was the JD named above and accepted service of the BN dated 5 October 2010, however the JC refused to acknowledge receipt of the same.

[80] Nevertheless, the BN is deemed served on 2 November 2010.

[81] Learned counsel for the JC submitted that the JD's contention that he has never seen or met Jamil bin Chik is false and untrue. The BN and CP from the earlier Shah Alam High Court Bankruptcy No 29–346 of 2009 were personally served on the JD by the same Jamil bin Chik and the JD had accepted service of the documents. The said Jamil bin Chik therefore is not unknown to the JD at least by sight unless of course the JD has been served with so many different court documents by various process servers such that he would not be in a position to recognise or remember who is who!

[82] See Appendix J — affidavit of service dated 2 April 2009 and affidavit of service dated 18 June 2009 in Shah Alam High Court Bankruptcy No 29–346 of 2009.

[83] For the JD to deny being served with the BN on the time, date and place in question, he must aver where he was on the stated time, date and place. It would of course be better if there are corroborative evidence from others who could vouch for his presence at a different place. All the JD needed to show was some evidence stating that he was in Singapore or elsewhere in Kuala Lumpur but not at Solaris Dutamas office on the date and time in question. The JD could have produced his passport to show that indeed he was most of the time in Singapore which he said is his new place of residence and that on the day in question he was in Singapore. Instead when questioned by the court, learned counsel for the JD said that even if the JD had been in Kuala Lumpur it does not mean that he was at the Solaris Dutamas' address. It cannot be the case that any person who wants to set aside the service of a process can just merely affirm an affidavit to deny that he was served with a process on the time, date and place referred to by the process server and that would suffice! That would open the floodgates to all and sundry to challenge the service of a process if it were so simple as that.

[84] In fact the averment of the process server Jamil bin Chik has a ring of truth round it. He said he went to the Wisma Mirama's address and found a notice on the door to say that the office has shifted to the Solaris Dutamas address. As alluded to earlier, the webpage of the parent company MCSB stated that 'We expect to be fully operational in our new Solaris Dutamas office by

11 October 2010'. As the process server had gone there on 2 November 2010 it is not unlikely for him to be able to find the JD there.

[85] Nowhere has the JD denies that he is the Chairman and CEO of MCSB or that Compusoft office is not in Solaris Dutamas. In fact the JD was very economical with respect to the address of Unit D3–6–01 Solaris Dutamas. If not for the fact that this court takes cognisance of the information as provided for in MCSB's website and the message posted there by the JD, we would tend to believe that the JD no longer has a place of business in Malaysia. A Companies Commission of Malaysia search on Compusoft dated 23 March 2011 (see Appendix G of the JC's submission) reveals that the JD is still listed as a Director of Compusoft Sdn Bhd (Compusoft), a Malaysia based company operating from Malaysia and with the director having a home address in Malaysia at No 2 SS24/9, Taman Megah, 47301 Petaling Jaya, Selangor (see Appendix H).

[86] As to how the JD had come to know about the BN, the JD disclosed that he only knew about it when he made a loan application and there discovered the bankruptcy proceeding. The JD had not disclosed which bank this was and when he made the said discovery. I asked learned counsel for the JD how this could be possible unless there is a system where upon service of a BN by a JC bank, all the other banks are also notified about it. Learned counsel was not able to explain how his client the JD had become aware of a so-called bankruptcy proceeding against him. Very little information is disclosed as to when the JD became aware of the bankruptcy action against him and the circumstances under which he came to know of the bankruptcy action.

[87] Faced with a conflict of different assertion of such divergent nature this court would look at which version has a ring of truth round about it and the party who is most economical in disclosing what he ought to know would be the party that the court would tend to disbelieve.

[88] Under ss 3(3) and 5(1)(d) of the BA, a JD's change of domicile is immaterial and it suffices if the JD has a dwelling house or carries on business or has a place of business in Malaysia. Far from being dormant as is the picture the JD has painted of his business in Malaysia, he is still very active in MCSB of which he has held himself out to be its president, chairman and CEO and the fact of moving to a new office in a new up — market commercial area in Solaris Dutamas would further reinforce the fact that he is still very much involved in business in Kuala Lumpur, Malaysia.

[89] There is no issue with serving the BN on the JD at his business address in Solaris Dutamas. It is not unusual and indeed it is normal to serve the BN at

his place of business for businessmen being busy as they are, would be home only very late and it would be difficult to serve on them at night.

[90] In fact the Bankruptcy Act specifically states that a debtor who departs or remains out of Malaysia to defeat or delay creditors ipso facto commits bankruptcy. Section 3(1)(d) of the BA reads:

> if with intent to defeat or delay his creditors he does any of the following things:
>
> (i) departs out of Malaysia or being out of Malaysia remains out of Malaysia, or
>
> (ii) departs from his dwelling-house or otherwise absents himself, or begins to keep house or closes his place of business.

[91] By painting a picture that with business failure all the companies that the JD once controlled are dormant, the JD was trying to evade service by stating that he is now a permanent resident in Singapore. The JD must be prepared to do a frank disclosure of the number of times he has travelled to Malaysia during the relevant period with respect to the entries in his passport and failure to exhibit this would cause the court to draw an adverse inference under s 114(g) of the Evidence Act 1950.

[92] Indeed in the JD's letter written under the letterhead of Compusoft with the then address at Wisma Mirama which letter was dated 15 July 2010 the JD had in the request for deferment of the loan repayment on account of his wife being diagnosed with colon cancer, written as follows to the JC:

> At the company level, MCSB Systems (M) Sdn Bhd is still experiencing low sales sue to overall weak economic conditions. With the Company at breaking even, cash flow is extremely tight. It is unable to repay me the overdue salary, thus affecting my ability to service the repayment instalment.
>
> It would be appreciated if Ambank would allow for a reduced sum or repayment of Compusoft's loan on compassionate grounds for a period of six months, with effect from this instalment due on 1 July 2010, till my wife and the company have fully recovered.
>
> I have enclosed 4 cheques, each of amount Ringgit Twenty Five Thousand (RM25,000/-). The first Teo cheques are for the current instalment payment (July-September-10) and the remaining two cheques are for the next instalment payment (Oct to Dec-10). I sincerely hope you will accept my request on compassionate ground. Your compassion and understanding will be deeply appreciated.
>
> If you need further clarification please feel free to call me at (03) 2147-4949.

[93] As can be seen the phone number for contact purposes is a Kuala Lumpur number and unless the JD can easily be contacted there it would be unreasonable of the JD to have given that number for contact purposes.

[94] For all the reasons given above I hold that the service of the BN was regular and in accordance with law. A

Whether the JC can commence a bankruptcy action a second time against the JD after the first bankruptcy was annulled B

[95] The JC did previously commence bankruptcy proceedings against the JD based on the judgment dated 16 April 2003 vide Shah Alam High Court Bankruptcy No 29–346 of 2009 and an RO and AO had been obtained against the JD on 3 December 2009. C

[96] However, upon the JD's appeal to the JC seeking the JC's indulgence on ground that his wife was suffering from cancer and had to seek medical treatment in Singapore and that all his financial resources was channeled towards seeking a cure for her, the JC had agreed to set aside the RO and AO D dated 3 December 2009 on the promise that he would make regular payments towards settlement of the judgment sum.

[97] The JC believing that the JD was sincere acted in good faith and consented to set aside the same. In the premises, the RO and AO dated E 3 December 2009 were set aside by order of court dated 9 February 2010.

[98] The JD himself has admitted in paras 8.1 to 8.4 of JD's affidavit in reply affirmed on 16 May 2011 in respect of encl 14 that the RO and AO dated F 3 December 2009 were set aside and annulled on 9 February 2010.

[99] The onus is therefore on the JD and/or his own solicitors to follow up with the order dated 9 February 2010 and file the same with the Insolvency Department. G

[100] In addition, when the JD's application to set aside the CP came up for mention before the Shah Alam High Court on 26 August 2010, parties were informed by Senior Assistant Registrar, Tuan Farid bin Daud that the file had been closed as the RO and AO dated 3 December 2009 had been annulled. The H JD was no longer adjudged a bankrupt and the JC is at liberty to file fresh bankruptcy proceedings. Surely if the record in the Insolvency Department is not updated because the JD had not extracted the order of annulment and served it on the Insolvency Department, the JC cannot be blamed for this and for all intents and purposes the JD was not a bankrupt when a second I bankruptcy proceeding was commenced against the JD.

[101] The JC has at all material times acted in good faith and complied strictly with the provisions and requirements of the BR and BA. In the

premises, these bankruptcy proceedings are regular and in accordance with law.

Whether the JC can only proceed with respect to 1/3 of the judgment debt against the JD as there were the third defendants against whom judgment had been entered

[102] The JD's contention is that the JC is claiming the entire judgment sum plus interests thereon from the JD solely and exclusively, even though the judgment is a judgment against the JD and two others. It is not a judgment against the JD alone. The first defendant is Compusoft. The JD is the second defendant and the fourth defendant is a co-guarantor Lim Kim Chow.

[103] In *Re Dato' Dr Elamaran a/l M Sabapathy, ex parte RHB Bank Bhd* 2010 MLJU 1424 in Kuala Lumpur High Court Bankruptcy No D-29–1698 of 2009, at p 9, His Lordship Varghese George JC (as he then was) dealt with this very same issue when he set aside the BN and CP. He said:

> I have perused the certified true copy of the said 'Penghakiman' made on 18 November 2008 and attached to the BN. There is nothing in the said Judgment to show that the three defendants named there (one of whom was the JD) was adjudged to be jointly and severally liable to pay the judgment sum to the JC.
>
> In the absence of the judgment spelling out expressly that the defendants were jointly and severally liable to the plaintiff, the judgment there has, as in the ordinary course, to be a judgment imposing joint liability or obligation on the three defendants to meet the judgment sum together. In such event the JD's obligation is only one-third the amount of the judgment sum and not as set out in the BN, or for that matter in the creditor's petition.

[104] Learned counsel for the JD argued that it follows therefore that the BN here is for an excessive sum vis-a-vis the JD. The entire bankruptcy proceeding is for a sum which was not due and recoverable from the JD, it being premised upon a joint judgment by the JC against the JD and two others.

[105] The JD submitted that the BN here cannot stand against the JD in the circumstances. The BN is invalid, its non-compliance (if at all) by the JD cannot amount to an act of bankruptcy, and it follows that the CP being founded on an invalid BN must also fail. In short, the BN and everything that flows from the BN is doomed to failure. On this ground alone, the JD argued that both the BN and CP must be set aside.

[106] As for me I cannot see how a judgment entered against all three defendants ('D1 Compusoft Sdn Bhd, D2 Lim Koon Chow and D4 Lim Kim Chow') cannot be enforced against anyone one or more or all of them for the words of the judgment when translated into English read:

IT IS THIS DAY ADJUDGED that the First Defendant, the Second Defendant and the Fourth Defendant do pay the Plaintiff: A

(i) the sum of RM21, 615,617.23 …

[107] The JC always has a choice to decide which of the three defendants to proceed against with respect to execution. So in a case where D1 has been wound-up and D4 is a bankrupt for instance, the JC would proceed to execute the whole judgment against D2. B

[108] In a case where judgment for the same amount is entered against D3 and D5 at a later date in a separate judgment, does it mean then that for a BN to be issued, it will be half the judgment debt? The above example illustrates some of the multifarious problems one would face in dividing up the judgment by the number of defendants in the judgment obtained. If it was intended that each of the three defendants can only be made liable for 1/3 of the judgment debt then the judgment must so expressed it. Otherwise there is no ambiguity in reading less than what it says which is that all the three defendants are each one of them liable for the full amount of the judgment debt and that collectively they would not be made liable for more than what is the judgment sum. This does not derogate from the fact that the JC has the liberty to decide which is the more effective and efficient way to recover the judgment debt and that could be proceeding against just D2 whom the JC deemed to be the man of substance. Taking a peek at the instrument under which the other defendants other than D1 have been sued, it appears that their liability is under a guarantee and indemnity agreement dated 30 August 1996 and as such under the Contracts Act the guarantor who had to pay can pursue his right of indemnity from the other guarantors. C D E F

[109] There is nothing unclear, confusing or vague about the sum to be paid by D1, D2 and D4 and the sum to be paid cannot be susceptible to an interpretation of a payment to be divided equally among the three defendants. Indeed cl 32 under 'Joint and Several Liability' of the guarantee and indemnity (Appendix L of JC's submission) reads: G

Where the expression 'the Guarantors' refers to two or more entities any agreement, covenant, undertaking, stipulation, proviso, term, condition or other obligation (a) expressed to be made to the Guarantors, shall be enforceable by them jointly and severally, and (b) expressed to be made by or on the part of the Guarantors shall be binding upon and enforceable against the Guarantors jointly and severally. H

I

[110] In *Alliance Bank Malaysia Bhd (formerly known Asmulti Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451 at pp 462–463; [2006] 2 CLJ 723 at pp 735–736, His Lordship Ramly Ali J (as he then was) had explained that even without the used of the

words 'jointly and severally' there is no ambiguity in the action as well as the liability of the guarantors as the defendants:

> [31] Back to the present action before this court, the plaintiff's claim against both the first and second defendants is based on the letters of guarantee they signed as guarantors to the overdraft facilities granted by the plaintiff to Strategy Powerhouse Sdn Bhd (where both of them were directors of the company at the material times). Both the letters of guarantee carry 'joint and several' liability on both the guarantors. This was clearly stated in the letters of guarantee. Both the defendants being educated, knew about it. That was the intention of the parties to the contract. The liability is to pay for liquidated claim on demand in the event Strategy Powerhouse Sdn Bhd failed to repay the facility.
>
> [32] The words 'jointly and severally' is defined as 'persons who are jointly and severally bound render themselves liable not only to a joint action against them, but also to a separate actions against them individually' (see *A Dictionary of Law* LB Curzon).
>
> [33] When the letters of guarantee provide for 'joint and several' liability what they meant is that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against them individually. In such situation, the plaintiff can proceed with one action against both of them at the same time or two separate actions against both of them individually. The effect is that, either way, the cause of action against any one of them is not discharged if judgment is entered against the other one. The fact that the said judgment in default dated 25 January 2005 against the second defendant as well as the prayer in the plaintiff's statement of claim do not state or insert the words 'jointly and severally' does not in any way change the position. The plaintiff's right on the cause of action against both of the defendants either jointly or individually (ie, severally) still survives. The plaintiff can always proceed against the first defendant even though a final judgment in default had been entered against the second defendant.

[111] Having read the above decision I am fortified that even without the words 'jointly and severally' in the body of the judgment, there is no ambiguity as to how much the plaintiff as JC can proceed against each one of the JC either alone or together or against all the three of them.

[112] For purposes of being discharged as a bankrupt later on, it would of course be relevant that there are other judgment debtors for the same debt who perhaps have not contributed towards payment of the JD and that the JD here has been shouldering the brunt and the full burden of it. The official assignee can of course take this into consideration in consenting to the JD's application to be discharged.

[113] In the circumstances I had dismissed the appeal in encl 42 with costs of RM10,000 which appeal is against the deputy registrar's decision to dismiss

the JD's application to set aside the BN.

The application of the JD to set aside the CP (encl 44)

[114] The JD has appealed to this court against the decision of the learned deputy registrar dated 27 September 2011 dismissing the JD's application vide summons in chambers dated 7 September 2011 ('encl 24') to set aside the CP.

[115] The JD served a sealed copy of encl 24 at 3pm on 9 September 2011 on the JC's solicitors office, a mere five days before the CP was fixed for hearing on 14 September 2011.

[116] On 14 September 2011 the learned deputy registrar directed parties to exhaust affidavits, file written submission on/by 23 September 2011 and fixed encl 18 for decision on 27 September 2011. On 27 September 2011, the learned deputy registrar dismissed encl 24 with costs and fixed the CP for hearing on 2 November 2011.

[117] The JD's application to set aside the CP is bereft and devoid of merit. The said application is premised on the following grounds:

(a) service of the CP is irregular and not in accordance with law, therefore the creditor's petition is pre-mature and invalid;

(b) the CP was not signed before the witness;

(c) this is the second time BN has been issued against the JD;

(d) the BN claims for wrongful interest;

(e) no leave of court was obtained to file the BN;

(f) the bankruptcy proceedings and/or BN are irregular; and

(g) the JC has failed to commence bankruptcy proceedings against the other JD.

[118] Most of the grounds relied on in the said application have already been dealt with at length in encls 40 and 42 above.

[119] I shall only deal with new grounds raised which have not been raised in the previous two applications.

Whether the CP was duly signed before a witness

[120] It is the JD's contention that the CP was not signed before the witness, Dato' M Pathmanathan of M/s M Pathmanathan & Co, solicitors for the JC

A simply because the words 'Signed by the Petitioner in my presence' are absent from the CP though the words 'Signed by the Petitioner' and below it 'Signature of Witness' are there and the signature of the said witness was there.

B **[121]** Learned counsel for the JD relied on in *Re v David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127 at p 128, where Zakaria Yatim J (as he then was) said:

> Rule 99(1) of the Bankruptcy Rules 1969 clearly states that 'Every petition shall be dated, signed and witnessed.' Under the rule when the petition is signed by the
C judgment creditor it must be done in the presence of the witness. In my view the creditor's petition is defective in that it fails to comply with r 99(1) and Form 9. Rule 99(1) should be construed strictly.

D **[122]** In the above case His Lordship did not consider the effect of ss 62 and 71 of the Interpretation Acts 1948 and 1967. I agree with the JC's submission that the omission of the said words does not invalidate the CP. I am convinced that the omission does not in any way prejudice the JD.

E **[123]** Sections 62 and 71 of the Interpretation Acts 1948 and 1967 provide as follows:

> Section 62
>
> Any written law prescribing a form shall be deemed to provide that an instrument or
F other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead.
>
> Section 71
>
G Save as is otherwise expressly provided, whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.

H **[124]** The principle of substance over form has thus received statutory sanction by virtue of the above provisions of the Interpretation Acts. One therefore need not be fixated or fastidious over form, forgetting in the process one's focus on the substance of the matter which substance is superior to and supercedes form.

I **[125]** The role of a witness is to attest one's signature. The CP clearly states 'Tandatangan saksi' which translated means 'Signature of Witness' and goes on to provide the witness' particulars. I can accept the explanation of the learned counsel for the JC that this is simply a slight deviation from the prescribed form which does not affect the substance of the CP and is clearly not intended to

mislead. The CP was clearly and obviously signed in the presence of the said witness even though the words 'in the presence of' were left out. The natural and ordinary meaning of the words 'Signature of Witness' means that the witness referred to had witnessed the signature of the petitioner. In any event the JD is not suggesting that it was somebody else not duly authorised by the petitioner that had signed on behalf of the petitioner.

[126] Hence the CP should not be invalidated based solely on the slight deviation from the prescribed form when no prejudice can be shown to have been suffered by the JD.

[127] Quite apart from the above, the JD submits that the JC has failed to comply with the procedural requirements of the BA and BR.

[128] In *Re Abrahamson; Ex parte Crisp & Gunn Ltd* (1978) 22 ALR 749 at p 752, Justice Neasey said:

> … the registrar's report states the opinion that the creditor's petition is deficient in that para 4 fails to state whether or not the debtor satisfied the court that he had a counterclaim, set-off or cross demand equal to or exceeding the sum specified in par (a) of the bankruptcy notice; and that accordingly, the petition does not allege an act of bankruptcy. I have no doubt the Registrar's opinion on this point is correct. The relevant act of bankruptcy under s 40(1)(g) so far as the present creditor's petition is concerned, is the failure 'to comply with the requirements of the bankruptcy notice' or 'satisfy the Court that he has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt … being a counter-claim, set-off or cross demand that he could not have set up in the action or proceeding in which the judgment or order was obtained'. The creditor's petition in this case alleges only failure to comply with the relevant bankruptcy notice. Such failure is not of itself an act of bankruptcy under s 41(g). The act of bankruptcy is to fail to comply with the requirements of the notice or to satisfy the court that he has a counterclaim etc. The creditor must allege and prove that the debtor has failed on both counts. That is elementary.
>
> The creditor's petition served upon the debtor has therefore not specified an act of bankruptcy, as it is required by s 47(1)(a), r 12(2), and Form 5 to do; and is invalid. The defect is a matter of fundamental substance and cannot be cured by s 306.

[129] In *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 26, the Supreme Court said:

> … since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy …

[130] I was invited by learned counsel for the JD to look at the JC's CP in the instant case.

[131] Section 3(1)(i) is a common act of bankruptcy that is normally committed before the issuance of a CP. It reads:

> A debtor commits an act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, *or* by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt *or* sum ordered to be paid in accordance with the terms of the judgment *or* order with interest quantified up to the date of issue of the bankruptcy notice, *or* to secure *or* compound for it to the satisfaction of the creditor *or* the court; *and* he does not within seven days after service of the notice in case the service is effected in Malaysia, *and* in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, *either* comply with the requirements of the notice *or* satisfy the court that he has a counter-claim, set off *or* cross demand which equals *or* exceeds the amount of the judgment debt *or* sum ordered to be paid *and* which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: … (Emphasis added.)

[132] As can be seen from the connective conjunctions, the whole sentence is a real mouthful! I believe we need only to consider the conjunctive 'either' and 'or' above as distinguishing between two main events that is the failure to pay the judgment debt and the JD having a counterclaim, set off or cross demand. An act of bankruptcy is committed if the JD does not pay the judgment debt within the seven days period or that he does not satisfy the court within the period that he has a counterclaim, set off or cross demand. 'Either/or' cannot be read as 'both/and'.

[133] A JC that states in the CP that an act of bankruptcy has been committed by the JD for failure to pay the judgment debt within seven days of being served with the BN is correctly stating that an act of bankruptcy has been committed. As the conjunction used is 'either'/ 'or' one need not have to state both events as the second event if not stated would mean that there was no second event of the JD giving notice that he has a counterclaim, set off or cross demand. If indeed the JD has given notice of his counterclaim, set off or cross demand and the same is not stated in the CP then prejudice would have been caused to the JD. Here the JD has not given notice of a counterclaim, set off or cross demand and it is not wrong to say that the JD has committed an act of bankruptcy by failing to pay the judgment sum within the seven days period.

[134] I am of the view that even if the non-stating of the fact that the JD has failed to give notice of his counterclaim, set off or cross demand is a defect or

irregularity, that does not invalidate the whole bankruptcy proceeding and is curable under s 131 of the BA which reads:

> 131 Formal defect not to invalidate proceedings
>
> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[135] The jurisprudence of s 131 of the BA can be found in the Court of Appeal case of *Arab-Malaysian Finance Bhd v Mohd Zakaria bin Salim* [2002] 3 MLJ 337 at p 340; [2002] 3 CLJ 530 where at p 533 His Lordship Gopal Sri Ram JCA (as he then was) observed:

> We are unable to agree with the conclusion of the High Court that the service of a photostat copy of the creditor's petition vitiates bankruptcy proceedings in toto. It is our view that it was for the respondent to show in a clear and convincing manner that he has suffered some serious prejudice or that a miscarriage of justice was occasioned to him by reason of the appellant's failure to comply with r 110 of the Bankruptcy Rules 1969 …

[136] The last issue I need to consider is the JD's contention that para 3 of the CP is incorrect and inaccurate because there is in fact more than 8m MCSB shares held by the JC as security. The JC has not disclosed these MCSB shares and the value thereof. The JC has failed to inform the court that it is a secured creditor. The JC has further failed to inform the court whether these MCSB shares have been sold (if at all), and if sold the proceeds of sale of these shares must be taken into account in the calculations in the BN and CP. If these shares have not been sold, then the JC must disclose these MCSB shares in the CP and inform the bankruptcy court whether it is surrendering these shares for the purposes of the bankruptcy proceedings. That in brief was the gist of the objection of the JD to the CP.

[137] It must be noted that this issue was not raised by the JD before the SAR and raised for the first time in the hearing of this appeal. These being allegations of facts which were already known to the JD, it cannot be raised during the appeal without leave of court first had and obtained as it involves the introduction of new evidence which the JC has no opportunity to reply.

[138] At any rate the security referred to in para 3 of the CP refers to security taken from the JD and not from some third parties. The definition of 'secured creditor' in s 2 of the BA means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached

A the property of the debtor before judgment. This definition would exclude chargees holding a third party charge (see *Re Kho Kak Siew, ex p MUI Bank Bhd* [1993] 1 MLJ 208). Here the shares that is said to have been taken as security are not that of the JD but of a third party, Compusoft. To qualify as a 'secured creditor', the creditor must show that it was holding a mortgage, charge or lien B on the JD's property as security for the debt due from the JD (*Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423; [1993] 2 AMR 1889; *Re Rabindera Singh Arjan Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] 2 CLJ 858; *Re Ti Hock Soon, ex p Perwira Habib Bank Malaysia Bhd* [1993] 1 CLJ 477; *Re Yap Kin, ex p United Malayan Banking Corp* C [1996] 5 MLJ 355).

[139] I was referred by learned counsel for the JD to the case of *Hongkong & Shanghai Banking Corp v Yip Kim Khoon* [1991] 3 MLJ 172; [1991] 2 CLJ 1631 where the court gave a wider meaning to the words 'secured creditor'. As D pointed out by the learned editors of *Bankruptcy Handbook*, MLJ Handbook Series, Malayan Law Journal Sdn Bhd, Kuala Lumpur (1998) at p II 36, this decision appears to be inconsistent with the other cases on this point.

[140] I therefore dismissed encl 44 with costs of RM10,000. E

PRONOUNCEMENT

[141] To summarise, encl 40 is the appeal against the dismissal of the JD's F application to set aside the substituted service of the CP. Enclosure 42 is the appeal against the dismissal of the JD's application to set aside the BN and to set aside the BN and encl 44 is the appeal against the JD's application to set aside the CP.

G **[142]** Based on all the above reasons I had dismissed each of the appeal in encls 40, 42 and 44 with costs of RM10,000 each to the JC.

Appeals dismissed with costs.

H

Reported by Ashok Kumar

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